

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JOSEPHINE A. FULKERSON,

Plaintiff(s),

v.

ANDREW SAUL,

Defendant(s).

Case No.: 2:18-cv-00310-JAD-NJK

REPORT AND RECOMMENDATION

On October 18, 2019, this case was reassigned to the undersigned magistrate judge. Docket No. 19. This case involves judicial review of administrative action by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s application for disability insurance benefits pursuant to Title II of the Social Security Act. Currently before the Court is Plaintiff’s Motion for Reversal and/or Remand. Docket No. 13. The Commissioner filed a response in opposition and a cross-motion to affirm, Docket No. 16, and Plaintiff filed a reply. Docket No. 17. This action was referred to the undersigned magistrate judge for a report of findings and recommendation.

I. STANDARDS

A. Judicial Standard of Review

The Court’s review of administrative decisions in social security disability benefits cases is governed by 42 U.S.C. § 405(g). *Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002). Section 405(g) provides that, “[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in

1 controversy, may obtain a review of such decision by a civil action . . . brought in the district court
2 of the United States for the judicial district in which the plaintiff resides.” The Court may enter,
3 “upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing
4 the decision of the Commissioner of Social Security, with or without remanding the cause for a
5 rehearing.” *Id.*

6 The Commissioner’s findings of fact are deemed conclusive if supported by substantial
7 evidence. *Id.* To that end, the Court must uphold the Commissioner’s decision denying benefits
8 if the Commissioner applied the proper legal standard and there is substantial evidence in the
9 record as a whole to support the decision. *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005).
10 Substantial evidence is “more than a mere scintilla,” which equates to “such relevant evidence as
11 a reasonable mind might accept as adequate to support a conclusion.” *Biestek v. Berryhill*, ____
12 U.S. ____, 139 S.Ct. 1148, 1154 (2019). “[T]he threshold for such evidentiary sufficiency is not
13 high.” *Id.* In determining whether the Commissioner’s findings are supported by substantial
14 evidence, the Court reviews the administrative record as a whole, weighing both the evidence that
15 supports and the evidence that detracts from the Commissioner’s conclusion. *Reddick v. Chater*,
16 157 F.3d 715, 720 (9th Cir. 1998).

17 Under the substantial evidence test, the Commissioner’s findings must be upheld if
18 supported by inferences reasonably drawn from the record. *Batson v. Comm’r, Soc. Sec. Admin.*,
19 359 F.3d 1190, 1193 (9th Cir. 2004). When the evidence will support more than one rational
20 interpretation, the Court must defer to the Commissioner’s interpretation. *Burch v. Barnhart*, 400
21 F.3d 676, 679 (9th Cir. 2005). Consequently, the issue before this Court is not whether the
22 Commissioner could reasonably have reached a different conclusion, but whether the final decision
23 is supported by substantial evidence.

24 It is incumbent on the Administrative Law Judge (“ALJ”) to make specific findings so that
25 the Court does not speculate as to the basis of the findings when determining if the Commissioner’s
26 decision is supported by substantial evidence. The ALJ’s findings should be as comprehensive
27 and analytical as feasible and, where appropriate, should include a statement of subordinate factual
28 foundations on which the ultimate factual conclusions are based, so that a reviewing court may

1 know the basis for the decision. *See, e.g., Gonzalez v. Sullivan*, 914 F.2d 1197, 1200 (9th Cir.
2 1990).

3 B. Disability Evaluation Process

4 The individual seeking disability benefits bears the initial burden of proving disability.
5 *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir. 1995). To meet this burden, the individual must
6 demonstrate the “inability to engage in any substantial gainful activity by reason of any medically
7 determinable physical or mental impairment which can be expected . . . to last for a continuous
8 period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A). More specifically, the individual
9 must provide “specific medical evidence” in support of his claim for disability. *See, e.g.*, 20 C.F.R.
10 § 404.1514. If the individual establishes an inability to perform his prior work, then the burden
11 shifts to the Commissioner to show that the individual can perform other substantial gainful work
12 that exists in the national economy. *Reddick*, 157 F.3d at 721.

13 The ALJ follows a five-step sequential evaluation process in determining whether an
14 individual is disabled. *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987) (citing 20 C.F.R. §§ 404.1520,
15 416.920). If at any step the ALJ determines that he can make a finding of disability or
16 nondisability, a determination will be made and no further evaluation is required. *See Barnhart v.*
17 *Thomas*, 540 U.S. 20, 24 (2003); *see also* 20 C.F.R. § 404.1520(a)(4). The first step requires the
18 ALJ to determine whether the individual is currently engaging in substantial gainful activity
19 (“SGA”). 20 C.F.R. § 404.1520(b). SGA is defined as work activity that is both substantial and
20 gainful; it involves doing significant physical or mental activities usually for pay or profit. 20
21 C.F.R. § 404.1572(a)-(b). If the individual is currently engaging in SGA, then a finding of not
22 disabled is made. If the individual is not engaging in SGA, then the analysis proceeds to the second
23 step.

24 The second step addresses whether the individual has a medically determinable impairment
25 that is severe or a combination of impairments that significantly limits him from performing basic
26 work activities. 20 C.F.R. § 404.1520(c). An impairment or combination of impairments is not
27 severe when medical and other evidence does not establish a significant limitation of an
28 individual’s ability to work. *See* 20 C.F.R. §§ 404.1521, 404.1522. If the individual does not have

1 a severe medically determinable impairment or combination of impairments, then a finding of not
2 disabled is made. If the individual has a severe medically determinable impairment or combination
3 of impairments, then the analysis proceeds to the third step.

4 The third step requires the ALJ to determine whether the individual's impairments or
5 combination of impairments meet or medically equal the criteria of an impairment listed in 20
6 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526. If the
7 individual's impairment or combination of impairments meet or equal the criteria of a listing and
8 meet the duration requirement (20 C.F.R. § 404.1509), then a finding of disabled is made. 20
9 C.F.R. § 404.1520(d). If the individual's impairment or combination of impairments does not
10 meet or equal the criteria of a listing or meet the duration requirement, then the analysis proceeds
11 to the next step.

12 Before considering step four of the sequential evaluation process, the ALJ must first
13 determine the individual's residual functional capacity. 20 C.F.R. § 404.1520(e). The residual
14 functional capacity is a function-by-function assessment of the individual's ability to do physical
15 and mental work-related activities on a sustained basis despite limitations from impairments.
16 Social Security Rulings ("SSRs") 96-8p.¹ In making this finding, the ALJ must consider all of the
17 symptoms, including pain, and the extent to which the symptoms can reasonably be accepted as
18 consistent with the objective medical evidence and other evidence. 20 C.F.R. § 404.1529. To the
19 extent that statements about the intensity, persistence, or functionally-limiting effects of pain or
20 other symptoms are not substantiated by objective medical evidence, the ALJ must evaluate the
21 individual's statements based on a consideration of the entire case record. SSR 16-3p. The ALJ
22 must also consider opinion evidence in accordance with the requirements of 20 C.F.R. § 404.1527.

23 The fourth step requires the ALJ to determine whether the individual has the residual
24 functional capacity to perform his past relevant work ("PRW"). 20 C.F.R. § 404.1520(f). PRW
25 means work performed either as the individual actually performed it or as it is generally performed

26 ¹ SSRs constitute the Social Security Administration's official interpretations of the statute
27 it administers and its regulations. *See Bray v. Comm'r, Soc. Sec. Admin.*, 554 F.3d 1219, 1224
28 (9th Cir. 2009). They are entitled to some deference as long as they are consistent with the Social
Security Act and regulations. *Id.*

1 in the national economy within the last 15 years or 15 years prior to the date that disability must
2 be established. In addition, the work must have lasted long enough for the individual to learn the
3 job and performed at SGA. 20 C.F.R. §§ 404.1560(b), 404.1565. If the individual has the residual
4 functional capacity to perform his past work, then a finding of not disabled is made. If the
5 individual is unable to perform any PRW or does not have any PRW, then the analysis proceeds
6 to the fifth and last step.

7 The fifth and final step requires the ALJ to determine whether the individual is able to do
8 any other work considering his residual functional capacity, age, education, and work experience.
9 20 C.F.R. § 404.1520(g). If the individual is able to do other work, then a finding of not disabled
10 is made. Although the individual generally continues to have the burden of proving disability at
11 this step, a limited burden of going forward with the evidence shifts to the Commissioner. The
12 Commissioner is responsible for providing evidence that demonstrates that other work exists in
13 significant numbers in the national economy that the individual can do. *Lockwood v. Comm’r,*
14 *Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010).

15 **II. BACKGROUND**

16 A. Procedural History

17 On October 16, 2014, Plaintiff filed an application for disability insurance benefits alleging
18 a disability onset date of May 30, 2014. *See, e.g.,* Administrative Record (“A.R.”) 149-50.
19 Plaintiff’s claim was denied initially on March 13, 2015, and upon reconsideration on August 6,
20 2015. A.R. 80-83, 85-90. On October 2, 2015, Plaintiff filed a request for a hearing before an
21 ALJ. A.R. 91-92. On September 28, 2016, Plaintiff, Plaintiff’s representative, and a vocational
22 expert appeared for a hearing before ALJ John Cusker. *See* A.R. 33-53. On January 10, 2017, the
23 ALJ issued an unfavorable decision finding that Plaintiff had not been under a disability, as defined
24 by the Social Security Act, through the date of the decision. A.R. 19-32. On December 21, 2017,
25 the ALJ’s decision became the final decision of the Commissioner when the Appeals Council
26 denied Plaintiff’s request for review. A.R. 1-6.

27 On February 20, 2018, Plaintiff commenced this action for judicial review pursuant to 42
28 U.S.C. § 405(g). *See* Docket No. 1.

1 **B. The Decision Below**

2 The ALJ's decision followed the five-step sequential evaluation process set forth in 20
 3 C.F.R. § 404.1520. A.R. 22-28. At step one, the ALJ found that Plaintiff meets the insured status
 4 requirements of the Social Security Act through December 31, 2019, and has not engaged in
 5 substantial gainful activity since May 30, 2014. A.R. 24. At step two, the ALJ found that Plaintiff
 6 has the following severe impairments: rheumatoid arthritis. A.R. 24. At step three, the ALJ found
 7 that Plaintiff does not have an impairment or combination of impairments that meets or medically
 8 equals the severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1.
 9 A.R. 24. The ALJ found that Plaintiff has the residual functional capacity to perform:

10 light work as defined in 20 CFR 404.1567(b): She can lift and/or
 11 carry 20 pounds occasionally and 10 pounds frequently. She can sit,
 12 stand, and/or walk for about 6 hours in an 8-hour workday, with
 13 normal breaks. She can occasionally stoop, crouch, crawl, and
 14 climb ramps and/or stairs, but can never climb ladders, ropes, or
 scaffolds. She can frequently perform fine and gross manipulation
 with her right, dominant hand, and must avoid concentrated
 exposure to hazards such as unprotected heights and dangerous
 machinery.

15
 16 A.R. 24-27. At step four, the ALJ found Plaintiff is capable of performing past relevant work as
 17 a supervisor of food cashiers/checkers. A.R. 27-28. Based on all of these findings, the ALJ found
 18 Plaintiff not disabled through the date of the decision. A.R. 28.

19 **III. ANALYSIS AND FINDINGS**

20 Plaintiff raises a single argument on appeal, contending that the ALJ erred in improperly
 21 discounting her testimony. *See* Mot. at 9-15; *see also* Reply at 3-4. The Commissioner responds
 22 that the ALJ articulated permissible factors supported by substantial evidence in discounting that
 23 testimony. *See* Resp. at 7-12. The Commissioner has the better argument.

24 The ALJ is required to engage in a two-step analysis to evaluate a claimant's testimony as
 25 to his pain and other symptoms: (1) determine whether the individual presented objective medical
 26 evidence of an impairment that could reasonably be expected to produce some degree of pain or
 27 other symptoms alleged; and (2) if so, whether the intensity and persistence of those symptoms
 28 limit an individual's ability to perform work-related activities. *See* SSR 16-3p. In the absence of

evidence of malingering, an ALJ may only reject the individual's testimony about the severity of symptoms by giving specific, clear, and convincing reasons. *See Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). Factors that an ALJ may consider include inconsistent daily activities, an inconsistent treatment history, and other factors concerning an individual's functional limitations. *See SSR 16-3p*. If an ALJ's determination to discount this testimony is supported by substantial evidence, the courts should not second-guess that determination. *Chaudhry v. Astrue*, 688 F.3d 661, 672 (9th Cir. 2012).

In this case, the ALJ discounted Plaintiff's testimony on several grounds, including that it was inconsistent with the medical record and that Plaintiff's rheumatoid arthritis was effectively controlled through medication. *See A.R. 26-27*. The ALJ did not err in doing so. The medical record is replete with findings supporting the ALJ's conclusion that Plaintiff experienced mild and transitory limitations that were effectively controlled with treatment. *See A.R. 253, 255, 259, 261, 263, 265, 267, 269, 271, 273, 274-75, 295, 297, 201, 303, 307, 310, 312*. "Contradiction with the medical record is a sufficient basis for rejecting the claimant's subjective testimony." *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008). Moreover, "[i]mpairments that can be controlled effectively with medication are not disabling for the purpose of determining eligibility for SSI benefits." *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006).²

² The ALJ also noted Plaintiff's daily activities in discounting her testimony. A.R. 26. On appeal, the Commissioner urges that there is no need to reach that factor because any error on that front would be harmless. *See Resp. at 11*. A social security claimant bears the burden of establishing that an ALJ's error prejudiced the outcome of his decision. *See, e.g., Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Given the other factors relied upon by the ALJ in discounting Plaintiff's testimony that were supported by substantial evidence, the undersigned agrees with the Commissioner that there is no need to address Plaintiff's daily activities because any error would be harmless. *Cf. Batson*, 359 F.3d at 1197 (any error in ALJ's reference to daily activities in discounting the claimant's testimony was harmless given the other reasons proffered supported by substantial evidence).

Similarly, Plaintiff argues that the ALJ erred in not accounting for side effects from her medications. *See Mot. at 13*. The Commissioner responds that there is no medical record supporting the existence of such side effects, so any error in the ALJ not addressing them was harmless. *See Resp. at 13*. The undersigned agrees with the Commissioner that Plaintiff has not established that any error on this issue would have been harmful.

1 Accordingly, the ALJ did not err in his evaluation of Plaintiff's testimony.

2 **IV. CONCLUSION**

3 Based on the forgoing, the undersigned hereby **RECOMMENDS** that Plaintiff's Motion
4 for Reversal and/or Remand (Docket No. 13) be **DENIED** and that the Commissioner's Cross-
5 Motion to Affirm (Docket No. 16) be **GRANTED**.

6 Dated: November 15, 2019

7 
8 Nancy J. Koppe
United States Magistrate Judge

9
10 **NOTICE**

11 This report and recommendation is submitted to the United States District Judge assigned
12 to this case pursuant to 28 U.S.C. § 636(b)(1). A party who objects to this report and
13 recommendation must file a written objection supported by points and authorities within fourteen
14 days of being served with this report and recommendation. Local Rule IB 3-2(a). Failure to file
15 a timely objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951
16 F.2d 1153, 1157 (9th Cir. 1991).